

***United States Court of Appeals
for the Second Circuit***

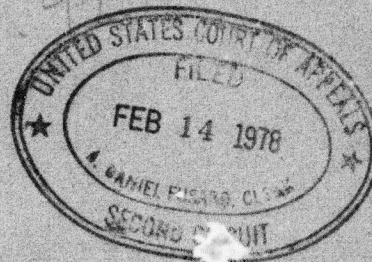


APPELLEE'S BRIEF

77-6175

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-6175



NORMAN BIRNBAUM, et al,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant-Appellants

BRIEF OF PLAINTIFF-APPELLEE - CROSS APPELLANT
NORMAN BIRNBAUM

February 13, 1978

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QUESTION PRESENTED ON CROSS APPEAL

Whether this civil action in a United States District Court, seeking damages from the United States based upon the torts of its employees, is a suit at common law within the meaning of the Seventh Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS
INVOLVED ON CROSS APPEAL

The Seventh Amendment provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

28 U.S.C. § 2402 provides:

"Any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury."

STATEMENT OF THE CASE ON CROSS APPEAL

A demand for jury trial was endorsed upon the complaint of plaintiff Birnbaum as provided for in Rule

38(b) of the Federal Rules of Civil Procedure. Compl., p.4. Prior to trial the district court rejected his jury trial demand. Tr. of April 7, 1977, p. 10. The court regarded plaintiff's legal position as "very good," id., pp. 3, 8, and said "it would probably be easier to write a decision your way," id., p. 9. The court apparently based its ruling upon a prediction that the Supreme Court -- particularly the Chief Justice -- would be concerned about practical problems of workload and delay which would arise in the district courts if jury trials were required in this type of case, id., pp. 3-4.

On May 4, 1977 this court without opinion denied plaintiff's petition for mandamus and his application for a stay of the trial pending petition for certiorari. Docket No. 77-3022, Circuit Judge Mansfield and District Judges Palmieri and Smith. On May 5, 1977, Mr. Justice Marshall denied an application for a stay, also without opinion.

If Birnbaum prevails on both the government's appeal and his cross-appeal, his case must be remanded for a new trial. The new trial will be limited to the issue of damages, as there are no other disputed jury issues.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY HELD
THAT A CAUSE OF ACTION FOR DAMAGES
EXISTS UNDER THE LAW OF NEW YORK
FOR WARRANTLESS MAIL OPENING.

There are several independent theories by which the CIA employees who opened mail would be liable to plaintiff under the law of New York, based upon the undisputed facts. These include liability for violation of the Fourth Amendment; statutory liability under New York Penal Law § 250.25 (prohibiting mail opening) and New York Civil Rights Law § 8 (prohibiting unreasonable searches and seizures); trespass; common law copyright; invasion of privacy, and common law of search and seizure. All of these theories are essentially in tort.

As we have little to add to the district court's discussion of common law copyright and invasion of privacy, the argument is limited to the other theories.

1. Fourth Amendment

It has been settled at least since Ex Parte Jackson, 96 U.S. 727 (1878), that warrantless mail opening by federal

agents violates the Fourth Amendment.^{1/} In Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), the Court held that the Fourth Amendment confers upon citizens a right to recover damages from persons who violate their Fourth Amendment rights. It follows that under the Fourth Amendment the agents who opened plaintiffs' mail would be liable to them.

^{1/} The Court stated:

"Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution."

96 U.S. at 733.

See also United States v. Van Leeuwen, 397 U.S. 249, 251 (1970); Oliver v. United States, 243 F.2d 391 (10th Cir. 1957); Oliver v. United States, 239 F.2d 818 (8th Cir. 1957), cert. dismiss'd, 353 U.S. 952 (1957).

The law of the Fourth Amendment as expounded in these decisions is a part of the law of New York.^{2/} The "law of the place" where the "wrongful act or omission occurred," 28 U.S.C. § 1346(b), means the "whole law" of the state where the incident took place, that is, "the principles of law developed in the common law and refined by statute and judicial decision in the various states." Richards v. United States, 369 U.S. 1, 7 (1962). As this court recently stated in Lambertson v. United States, 528 F.2d 441 (2d Cir. 1976):

"[I]f the state would look to a state or federal statute in determining the liability of a private person for the tort in question, the same statute will be applied in measuring the conduct of the government; otherwise it will not."
528 F.2d at 444.

Under the Supremacy Clause, Article VI of the Constitution, the courts of every state are bound to look to and apply the Fourth Amendment in cases where such claims are asserted.

^{2/} See, e.g., People v. Sanders, 52 Misc. 2d 989, 277 N.Y.S. 2d 487 (Queens Co. 1967), applying Fourth Amendment to search and seizure of a package in custody of Railway Express, citing Ex Parte Jackson, supra, among other decisions.

"[T]he Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon the states, courts, and the people, . . ." Testa v. Katt, 330 U.S. 386, 391 (1947).

See also Robb v. Connolly, 111 U.S. 624 (1884), at 637:

"Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, wherever those rights are involved in any suit or proceeding before them."

A case in point is Ira. S. Bushey & Sons, Inc. v. United States, 276 F.Supp. 518 (E.D.N.Y. 1967), (Weinstein, J.), aff'd 398 F.2d 167 (2d Cir. 1968). The plaintiff sued the United States for damages to a drydock. In ruling upon a question similar to the one under discussion the court said:

"The 'whole law of the State where the act or omission occurred' is applicable -- and this law includes a state's rules on choice-of-law. Since the states must apply federal maritime law to torts of this kind occurring on navigable waters, we are led by this round-about route back to maritime substantive law as determinative of the liabilities of the parties. [Citations omitted.]" 276 F.Supp. at 524.

See also Hess v. United States, 361 U.S. 314, 316 (1960).

In cases involving governmental searches and seizures the states must apply federal Fourth Amendment law, no less than they must apply federal maritime law to torts arising on navigable waters.

It might be argued that Bivens was concerned only with the remedies available in federal courts for Fourth Amendment violations and that therefore the decision is not binding upon the states. This, however, would be contrary to the Court's statement of its holding, namely that violation of the Amendment "gives rise to a cause of action for damages" 403 U.S. at 389. The effect of this ruling is the same as if the Amendment were amended to provide that any citizen whose rights thereunder are violated shall be entitled to damages from the violator.

Even if state courts were not bound to incorporate Bivens into the fabric of state law, plaintiff would be entitled to prevail on his Fourth Amendment theory if New York courts voluntarily chose to incorporate the rule of Bivens into the common law of the state. There is every indication that they would so choose if the opportunity were presented. ^{3/}

^{3/} As the court stated in the similar setting of Ira S. Bushey & Sons, Inc. v. United States, supra:

"Where there are no specific decisions on the point, federal judges may turn to the general doctrines of accepted tort law, whence judges derive their governing principles in novel cases' [citation and ellipsis omitted]."
276 F.Supp. at 527.

While we have found no post-Bivens case in which a New York court has had occasion to apply the Bivens decision, the occasion has arisen in the courts of sister states. In the two cases which we have found, the courts held that under Bivens a cause of action for damages lies in state court for violations of Fourth Amendment rights. See Cashen v. Spann, 125 N.J. Super 386, 311 A.2d 192, 201 (1975), cert. den. 423 U.S. 829 (1975); Newell v. City of Elgin, 34 Ill. App.3rd 719, 340 N.E.2d 344, 348-9 (1976). There is no reason to believe that New York's courts would adopt a different position.

Indeed, both before and after Bivens, the courts of New York and other states have commonly allowed suits for damages for deprivation of constitutional rights, following relevant Supreme Court decisions. See, e.g., Cunliffe v. County of Monroe, 63 Misc.2d 62, 312 N.Y.S.2d 879 (Monroe Cty. 1970) (action under Fifth Amendment for unconstitutional taking of property without just compensation); Nader v. General Motors Corp., 57 Misc.2d 301, 305, 292 N.Y.S.2d 514 (N.Y.Co. 1968), aff'd 31 A.D.2d 392, 298 N.Y.S.2d 137 (1st Dept. 1969), aff'd 25 N.Y.2d 560 (1970) (Fourth, Fifth and Fourteenth Amendments); Papadopoulos v. Oregon State Board of Higher Ed., 511 P.2d 854, 876 (Ore.Ct. of App. 1973), cert. denied,

417 U.S. 919 (1974) (action under Fourteenth Amendment for termination of employment without due process); Kewin v. Board of Ed. of Melvindale, 65 Mich. App. 472, 237 N.W.2d 514, 519-20 (1975) (action under Fourteenth Amendment for forced maternity leave).^{4/} Thus, in common law courts both in and outside this state there is a settled tradition of recognizing a cause of action for damages for violation of Fourth Amendment and other federal constitutional rights.

Further, this aspect of state law accords with the New York principle that where a positive law, such as a statute or constitutional provision, is designed to protect a class of individuals, a member of the class has a cause of action against one whose acts violate the statute for any damages proximately caused by the acts. See, e.g., Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 304-6 (1936) (statute requiring safeguards for employees); Karpeles v. Heine, 227 N.Y. 74, 78-80 (1919) (statute prohibiting persons under 16 from operating elevators). See also the discussion in Osborne v. Salvation Army, 107 F.2d 929 (2d Cir. 1939) (statute requiring safety device for window cleaners). See generally Prosser, Torts, pp.190-202 (1971 ed.).

^{4/} See also State v. Frye, 58 Ariz. 409, 120 P.2d 793, 797 (Sup.Ct. 1943) (dictum):

"The English courts and the courts of our own nation hold that an action for damages always lies against the one responsible for the unlawful search and seizure."

Highly relevant is the recent decision in Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (2d Cir. 1975). The district court dismissed a complaint in which the plaintiff sued the United States under the Federal Tort Claims Act based upon the Postal Service's failure to renew certain contracts with the plaintiff. This court reversed on the basis of the plaintiff's theory that the non-renewal determination was made without notice and hearing as required by postal regulations and the Due Process Clause. The court stated:

"It is possible that the failure of the Postal Service to comply with its own regulations, or with constitutional requirements, to provide a hearing before taking action constituting debarment may be treated under state law as negligence per se. In cases where a law is designed for the protection of a given class of persons, and its violation results in injury to a member of that class, at least some states will find that the statutory violation is evidence of a breach of a duty of care, even if not negligence per se. See W. Prosser [Handbook of the Law of Torts], § 36, at 200. We cannot readily conclude that appellants have failed to raise a claim which may be cognizable under state law. Therefore, we leave this matter for further consideration by the district court upon remand." 527 F.2d at 1261.

As demonstrated by the state cases cited above, this court was correct in surmising that New York is among the states whose courts routinely recognize liability in favor of a

member of the class protected by a statute or constitutional provision violated by the defendant. ^{5/}

The Fourth Amendment manifests a purpose to protect politically disfavored persons, persons suspected of wrongdoing, and persons committing suspicious acts such as sending letters to socialist countries, from unreasonable searches and seizures. Insofar as the Amendment bars opening mail, it is designed to protect users of the mail. In any event, plaintiff is among the class of persons for whose protection the Amendment was adopted.

It is immaterial that the Fourth Amendment bars mail opening only by government agents and not by private persons. It has long been settled that the wrongs which are covered by the Tort Claims Act include wrongs which only government agents can commit. Indian Towing Co. v. United States, 350 U.S. 61 (1955). The Fourth Amendment is no different in this respect than the Due Process Clause and postal regulations which were sustained as a basis for relief under the Tort Claims Act in the Myers & Myers case, supra.

^{5/} For other decisions upholding liability under the Tort Claims Act on the basis of federal employees' violations of federal regulations, see, e.g., Underwood v. United States, 356 F.2d 92, 98-9 (5th Cir. 1966) (Air Force regulation); United States v. Shively, 345 F.2d 294, 296 (5th Cir. 1965), cert. denied, 382 U.S. 883 (1965) (Army regulation).

2. Statutory Liability

The CIA employees who opened plaintiff's mail violated at least two state statutes.

Section 250.25 of the New York Penal Law provides:

"A person is guilty of tampering with private communications when:

"1. Knowing that he does not have the consent of the sender or receiver, he opens or reads a sealed letter or other sealed private communication; or

"2. Knowing that a sealed letter or other sealed private communication has been opened or read in violation of subdivision one of this section, he divulges without the consent of the sender or receiver, the contents of such letter or communication, in whole or in part, or a resume of any portion of the contents thereof; . . ."

Section 8 of the New York Civil Rights Law provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants can issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The statute is a verbatim enactment of the Fourth Amendment and, although no New York court has considered the point, one can only assume that mail opening would be held violative of

Section 8, just as it violates the identically worded
Fourth Amendment. Ex Parte Jackson, supra.^{6/}

Plaintiff is a member of the classes for whose protection the two statutes were intended. It is apparent that New York Penal Law § 250.25 was enacted to protect persons using the mail. New York Civil Rights Law Section 8 manifests a purpose to protect the same classes as its Fourth Amendment model discussed above.

Hence, under the New York decisions cited at pages 12-13 above, a cause of action would lie against any individual who opened plaintiff's mail in this state. It follows that plaintiff may assert the claim against the United States under the Federal Tort Claims Act. Cf., Myers & Myers, Inc. v. United States Postal Service, supra.

^{6/} Unlike the Fourth Amendment, and the search and seizure provision in the New York Constitution, Article 1, § 12, Section 8 bars unreasonable searches and seizures by private individuals as well as by government officials. Agency for Investigation and Detection, Inc. v. Department of State, 47 Misc.2d 306, 262 N.Y.S.2d 694 (N.Y.Co. 1965), aff'd on other grounds, 25 A.D.2d 738, 269 N.Y.S.2d 168 (1st Dept. 1966), aff'd 19 N.Y.2d 764 (1967).

7/

3. Trespass

The action of trespass has been applied to chattels since the middle ages. See generally Prosser, supra, p.76. The action covers

"any direct and immediate intentional interference with a chattel in the possession of another. Thus it is a trespass to damage goods or destroy them, to make an unpermitted use of them, or to move them from one place to another [citations omitted]." Id.

This form of action was inherited by every state as part of the common law, and it has long been specifically recognized in New York. See, e.g., Wintringham v. Lafoy, 7 Cow. 735 (1837) (inspection of jewels by constable under threat of levy); Aikin v. Buck, 1 Wend. 466 (1828) (carrying away logs); Hanmer v. Wilsey, 17 Wend. 91 (1837) taking horse pursuant to writ of attachment); Shipman v. Clark, 4 Denio 446 (1847) (13 pieces of elm timber). Trespass to chattels is a wrongful act within the scope of the Federal Tort Claims Act. Hatahley v. United States, 351 U.S. 173 (1956) (destruction of horses).

7/ While the district judge did not rely upon this theory of action, it provides ample ground to support his judgment.

Wintringham v. Lafoy, supra, illustrates the scope of this theory of action under New York law. In that case the defendant, a constable, entered a store occupied by one Gallis for the purpose of levying upon certain jewels in Gallis' possession. Gallis had previously assigned title to the jewels to the plaintiff. Gallis placed the jewels on a glass case, where the defendant inspected and inventoried them. The defendant then stated that he would remove the jewels pursuant to the levy unless security was given. Gallis gave security and the defendant left without the jewels.

The plaintiff brought an action for trespass to the jewels, and the verdict was in his favor. On appeal the defendant argued that no trespass was proven because the jewels remained untouched by him. 7 Cow. at 737. The court rejected this argument and affirmed, stating: "Every unlawful interference by one person with the property or person of another, is a trespass." 7 Cow. at 738. The court ruled that by threatening to remove the jewelry the defendant "exercised dominion over it" sufficient to constitute a trespass. Id.

The letters written and mailed by plaintiff Birnbaum were his property and remained in his possession at the time they were opened and copied. Under postal regulations, mail

may be recalled by the sender before delivery to the addressee. 8/

Courts which have considered the effect of the United States Post Office regulations giving the sender of mail matter the right to recall the same before delivery have held that the Post Office Department is the agent of the sender, and that the mail matter is to be considered as though still in the possession of the sender. [Citations omitted.]" Fitzgerald v. W. F. Sebel Co., Inc., 295 F.2d 654, 656 (10th Cir. 1961. 9/

See also Article 4 of the Convention of the Universal Postal Union:

8/ During 1970 when plaintiff's mail was opened the regulation appeared in 39 C.F.R. § 153.5, and provided in pertinent part:

"Mail deposited in a collection box or post office may be recalled on proper identification by the sender"

The regulation now appears in Section 153.5 of Chapter I of the Postal Service Manual, incorporated by reference in 39 C.F.R. § 111.1.

9/ At the time of the Fitzgerald decision, the regulation appeared at 39 C.F.R. § 43.5 and is reprinted at 295 F.2d 665, n.1.

"A postal item shall remain the property of the sender until it is delivered to the rightful owner, except when the item has been seized in pursuance of the legislation of the country of destination." 22 U.S.T. 1088. ^{10/}

It follows that the acts of opening and copying plaintiff's mail constituted a trespass for which the CIA agents would be liable under state law. The acts were plainly an "unlawful interference . . . with the property" of plaintiff, Wintringham v. Lafoy, supra, 7 Cow. at 738, and, indeed, constituted a far greater interference than ^{11/} the acts of the defendant in that case.

In the district court the government argued that mere interference, without actual damage to the letters, does not give rise to a cause of action in trespass, citing cases from other jurisdictions. This argument is contrary to the law of New York, as evidenced by Wintringham v. Lafoy, supra, where the defendant was held liable for trespass to jewels which he did not even touch.

^{10/} The convention was approved by the President on December 11, 1965. See 16 U.S.T. 1291.

^{11/} To use Prosser's language, the acts constituted a "direct and intentional interference" with plaintiff's mail, in that the mail openers both made "an unpermitted use" of plaintiff's letters and "move[d] them from one place to another." Prosser, supra, p.76.

The same decision disposes of the argument, also offered by the government below, that any liability based on trespass would be limited to damages to the property itself, that is the letters. Plaintiff is entitled to recover for any damages resulting from the wrongful trespassory acts, just as the Wintringham plaintiff recovered even though the jewels were not touched, let alone damaged. See also Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977), holding that the plaintiff could recover under the Tort Claims Act for emotional suffering and loss of reputation which resulted by a round-about route from unlawful eavesdropping by FBI agents.

4. Common Law of Search and Seizure

Plaintiff is required only to establish that an unlawful search and seizure of his mail would result in liability under the law of New York, and it is of little moment whether the mail opening be denominated a trespass, a Fourth Amendment violation, invasion of privacy, a statutory violation, or simply a wrongful act of unlawful search and seizure.

There are at least three recent New York decisions recognizing liability for unlawful search and seizure. In

Hook v. State, 15 Misc.2d 672, 181 N.Y.S.2d 621 (Ct.Cl. 1958), the claimant sought damages for, among other things, a warrantless search of his house by state employees. The court recognized a cause of action based upon Section 8 of the New York Civil Rights Law, supra, 15 Misc.2d at 678-9. However, the court dismissed the claim based upon a finding that the claimant's wife had consented to the search. 15 Misc. 2d at 679.

In Brenon v. State, 31 A.D.2d 776 (case 2), 297 N.Y.S.2d 88 (4th Dept. 1969), the Court of Claims awarded damages after trial to the claimant in an "action for damages for illegal search and seizure."^{12/} The Appellate Division reversed on the ground that the record showed "that the State sustained its burden of proving by a preponderance of the evidence that the claimant did consent" to the search. Thus the appellate court accepted the validity under state law of a damage suit for unlawful search and seizure, and reversed only because the State established the defense of consent, as in the Hook case, supra.

^{12/} The court predicated liability upon the search and seizure provisions of both federal and state constitutions. See Record on Appeal, pp.7,9.

In Casler v. State, 33 A.D.2d 305, 307 N.Y.S.2d 695 (4th Dept. 1970), the court affirmed an award of damages to the victim of a warrantless search and seizure, including arrest and detention.^{13/} The court rejected the following argument offered by the State:

"The State argues that the rules forbidding illegal search and seizure were designed as a shield to protect the liberty of the citizen and should not be used as a sword to gain affirmative relief against the State; that suppression of improperly obtained evidence should be the limit of the penalty for illegal search and seizure, and that one found to be violating the law, as claimant was, should not be given a bonus in the form of an award against the State where the search and seizure rules are found to have been violated." 33 A.D.2d at 309.^{14/}

^{13/} The court alternately characterized its legal theory as "false arrest" and violation of "the search and seizure rules." 33 A.D.2d at 309.

^{14/} The above decisions occurred in cases brought against the State under the Court of Claims Act. 29 A McKinney's Consol. Laws of New York, Part 2. In that Act the State waived sovereign immunity and consented to liability "in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations" Section 8. The Court of Claims is given jurisdiction as to "the torts of [the state's] officers or employees while acting as such officers or employees" Section 9(2). In sum, like the Federal Tort Claims Act, the Act makes the State liable for the torts of its employees to the same extent as a private employer. Thus it is implicit in the decisions discussed above -- acknowledging state liability for unlawful search and seizure -- that a private employer would be liable under state law in like circumstances. It follows that the United States is liable under the Tort Claims Act for unlawful searches and seizures in New York by its employees.

To the same general effect are the other cases cited by the district court, 436 F.Supp. at 984-5: People v. Defore, 242 N.Y.13, 150 N.E.585 (1926); Frady v. State, 19 A.D.2d 783, 242 N.Y.S.2d 95 (3d Dept. 1963); Herman v. State, 78 Misc.2d 1025, 357 N.Y.S. 2d 811 (Ct. Cl. 1974); Baisch v. State, 76 Misc.2d 1006, 351 N.Y.S.2d 617 (Ct. Cl. 1974).

In contrast to the above decisions we have found no New York case, and none is cited by the government, which even suggests that damages may not be recovered from the perpetrator of an unlawful search and seizure. The government merely argues that the cited New York cases "deal with activity which is unconstitutional and otherwise a recognized tort, such as battery or trespass (emphasis in original)." Gov. Br., p.37. This assertion, even if true, benefits plaintiff, not the government, as it is a precise description of what the present case involves, namely activity which is both unconstitutional and recognized as the torts of trespass, invasion of privacy and copyright infringement among others.

II.

THE DISTRICT COURT CORRECTLY HELD THAT NEITHER THE DISCRETIONARY FUNCTION NOR THE POSTAL MATTER EXCEPTION APPLIES TO THIS CASE.

1. Discretionary Function Exception

This issue is, as the district court ruled, governed by Myers and Myers, Inc. v. United States Postal Service, 527 F.2d 1252, 1261 (2d Cir. 1975), and Hatahley v. United States, 351 U.S. 173, 191 (1956). Here, as in those cases, the acts of the government employees involved were in clear violation of specific statutes ^{15/} and regulations, ^{16/} as well as the Fourth Amendment. No officer or employee of the CIA or Postal Service possessed "discretion" to flout these provisions of law.

No act of Congress or regulation even purported to confer discretion on government officials to embark on a

^{15/} See, e.g., 39 U.S.C. § 3623(d); 18 U.S.C. §§ 1701, 1702, 1703(b). See also the state statutes discussed in section I.

^{16/} See, e.g., Postal Regulation 361.61 which at the time in question provided:

"No persons in the postal service, except those employed for that purpose in dead-mail offices, may break or permit breaking of the seal of any matter mailed as first-class mail without a search warrant, even though it may contain criminal or otherwise unmailable matter, or furnish evidence of the commission of a crime."

program of warrantless mail opening. Moreover, so long as the Fourth Amendment stands, no act of Congress or regulation could confer such discretion. Hence, the decision to open mail was not an "abuse" of discretion which was given, but an exercise of power which was far outside the zone of discretion which was or could be given to the CIA.

It is not necessary to argue that an act of a government employee which violates any provision of the Constitution falls outside the discretionary function exemption. There are particularly compelling reasons to hold that the exemption does not cover violations of the Fourth Amendment, as in this case, or Due Process as in Myers & Myers, supra. Both of these provisions were adopted for the specific purpose of defining areas where governmental officials could have no discretion. For example, the framers of the Fourth Amendment desired to deny executive officials the discretion to conduct general searches, with or without warrants, such as had plagued the colonists under George III, and such as re-emerged in the CIA's indiscriminate mail searches. See Marcus v. Search Warrant, 367 U.S. 717, 724-9 (1961). The Amendment clearly and specifically proscribes such searches. It would be ironic indeed for a court of the United States now to hold that the CIA

employees were performing legally cognizable "discretionary functions" when they ordered the mail search.

2. Postal Matter Exception

In addition to the reasons given by the district court, 436 F.Supp. at 974, this exception does not apply because plaintiff's claim does not arise out of "loss, miscarriage or negligent transmission" of his mail, as referred to in 28 U.S.C. § 2680(b). There is no claim or proof in this record that any mail was lost, that any was miscarried, or that any was transmitted negligently. What is alleged and proven is that the mail was tampered with and opened. Section 2680(b) does not exempt such acts.

Marine Insurance Co. v. United States, 378 F.2d 812 (2d Cir. 1967), cert. denied 389 U.S. 953 (1967), Gov. Br. pp. 28-9, does not support the government's position. As appears in the government's description of that case, Gov. Br. p. 29, it was an action for damages based upon the loss of a package of emeralds in the mail. Thus the claim arose from the "loss ... of letters or postal matter" as referred to in Section 2680(h), and it is hardly surprising that the court held that the statutory exception applied. But nothing in the decision supports extending the exception to claims which do not arise from loss, miscarriage or

negligent transmission of mail.

The government's reliance upon usage of the word "miscarry" in the Oxford English Dictionary, based in turn upon Shakespeare's usage in Henry VIII, Gov. Br. pp. 29-30, is amusing but not persuasive.

III.

THE DAMAGES AWARDED BY THE DISTRICT
COURT WERE NOT EXCESSIVE

We have little to add to what is said by the district court and co-appellees on this subject. Suffice it to emphasize that fixing damages in this type of case

"...is a difficult question at best. Objective standards for measuring injury resulting from an invasion of privacy or an appropriation of one's name, likeness, or reputation are unlikely to be available, so that a considerable degree of discretion must rest with the finder of fact." Big Seven Music Corp. v. Lennon, 554 F.2d 504, 512 (2d Cir. 1977).

If anything, Judge Weinstein erred in awarding an amount which was far below the advisory verdict of even the most tightfisted juror. In any event, the \$1,000.00 judgment is so small that it is a waste of this court's time to deliberate over whether the judge should have awarded a few hundred dollars less.

IV.

THE DISTRICT COURT ERRED IN DENYING
PLAINTIFF BIRNBAUM'S DEMAND FOR TRIAL BY
JURY, BECAUSE TRIAL BY JURY IN THIS CASE
IS GUARANTEED BY THE SEVENTH AMENDMENT.

Summary

The applicability of the Seventh Amendment depends primarily upon whether this tort suit for damages against the United States is a suit at common law within the meaning of the Amendment. In a series of recent decisions the Supreme Court has invigorated the Amendment and expanded the meaning of "suits at common law" to embrace types of suits which were unknown at common law, so long as they involve "legal" issues. Under these decisions there is no doubt that the present action is a suit at common law within the Amendment. Further, despite occasional judicial statements to the contrary, common law suits against the Crown were routine in England since at least the fourteenth century, and such suits were invariably tried by jury.

Under the doctrine of sovereign immunity the United States may not be sued for damages without its consent, such as is given by the Federal Tort Claims Act. Sovereign immunity has no basis in the Constitution. The government may attach reasonable conditions to its consent. But a condition which runs afoul of an important, specific provision of the

Constitution is invalid. 28 U.S.C. § 2402 is therefore invalid insofar as it purports to deny a trial by jury in this case.

Problems of workload and delay in federal courts, serious as they are, do not justify a departure from the command of the Seventh Amendment, and a unanimous Court specifically so held in two very recent decisions.

1. This Civil Action in Tort to Recover Damages From the Government* is a Suit at Common Law Within the Meaning of the Seventh Amendment.

Beginning in 1959 the Supreme Court has decided a series of cases whose cumulative effect is an explosive expansion of the scope of the jury trial guaranty in the ^{17/}Seventh Amendment. In the course of this series of decisions, particularly the four most recent ones, the Court clarified the meaning of the "suits at common law" which are subject to the Amendment. As its starting point the Court has repeatedly quoted the following passage from Parsons v. Bedford, 3 Pet. 433, 446-7 (1830):

^{17/} Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Ross v. Bernhard, 396 U.S. 531 (1970); Curtis v. Loether, 415 U.S. 189 (1974); Pernell v. Southall Realty, 416 U.S. 363 (1974); Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm., 430 U.S. 442 (1977).

"The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . By common law [the Framers of the Amendment] meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable remedies were administered. . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights. (Emphasis in original.)"^{18/}

In Ross v. Bernhard, supra, the Court held that a stockholder derivative suit for damages for breach of contract and gross negligence was a "suit at common law" within the meaning of the Amendment. Stockholder derivative suits were not allowed at all in 1791 when the Amendment was adopted. 396 U.S. at 534. They were first allowed in the nineteenth century in courts of equity both in this country and in England.^{19/}

The Court stated that the "Seventh Amendment question depends on the nature of the issue to be tried

^{18/} As quoted in Curtis v. Loether, supra, 415 U.S. at 193. See also Pernell v. Southall Realty, supra, 416 U.S. at 375-6; Ross v. Bernhard, supra, 396 U.S. at 533.

^{19/} Until the merger of law and equity in 1938 the suits were entertained on the equity side of federal courts. See, e.g., Dodge v. Woolsey, 59 U.S. 331, 336, 341 (1856).

rather than the character of the overall action." 396 U.S. at 538. Since the suit was for money damages based in part on breach of contract and gross negligence, the Court held that at least some of the issues were "legal," and therefore a jury trial was required. Id. at 542-3.

Curtis v. Loether, supra, presented the question whether a jury trial was constitutionally required in an action for damages under the Civil Rights Act of 1968, 42 U.S.C. § 3612. The Act created a new, statutory cause of action where none had previously existed. The Court held that the statutory action was "an action to enforce 'legal rights' within the meaning of our Seventh Amendment decisions." 415 U.S. at 195. This was so because a "damages action under the statute sounds basically in tort" and is "analogous to a number of tort actions recognized at common law." Id. "More important," said the Court, "the relief sought here -- actual and punitive damages -- is the traditional form of relief offered in the courts of law." Id. at 196.

In Pernell v. Southall Realty, supra, the Court considered the applicability of the Amendment to a statutory action to recover possession of real property, D.C. Code § 16-1501. The court of appeals held that a jury

trial was not required because neither the statute nor its equivalent existed in 1791. The Court rejected this test, stating:

"Whether or not a close equivalent to § 16-1501 existed in England in 1791 is irrelevant for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty. See Curtis v. Loether, supra, at 195, . . . " 416 U.S. at 376.

The Court then held that the Amendment applied because the right to possession of real property had traditionally been determined by law courts, not equity courts.

In Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm., supra, the Court upheld the power of Congress to entrust the imposition of civil penalties to an administrative agency where there is no jury trial. This is but an application of a principle often expressed by the Court, for example in Pernell v. Southall Realty, supra, 416 U.S. at 383:

"We may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency. Congress has not seen fit to do so, however,

but rather has provided that actions under 16-1501 be brought as ordinary civil actions in the District of Columbia's court of general jurisdiction. Where it has done so, and where the action involves rights and remedies recognized at common law, it must preserve to parties their right to a jury trial."

The Court concluded its opinion in Atlas by emphasizing that the "Seventh Amendment prevents Congress from depriving a litigant of a jury trial in a 'legal' action before a tribunal customarily utilizing a jury as its factfinding arm, Pernell v. Southall Realty, supra" 430 U.S. at 461 n. 16.

Under these decisions a jury trial is constitutionally required in this case. Like the suit in Curtis ^{20/} v. Loether, supra, this action "sounds basically in tort" and seeks compensatory damages, "the traditional form of relief offered in the courts of law." Indeed, it is difficult to imagine issues which are more traditionally "legal" than those arising in a tort suit for damages. Such suits have always been entertained in the common law courts, and

^{20/} In Curtis the Court explained what this phrase meant as follows: "the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach." 415 U.S. at 195. The same is true of plaintiff's theories of action under the Fourth Amendment as interpreted in Bivens v. Six Unknown Agents, supra, and under New York Civil Rights Law § 8 and Penal Law § 250.25. Another of plaintiff's theories, trespass, is an ancient tort.

never in equity. Nor have they been maintained in admiralty except as to maritime torts.

Unlike the administrative proceedings in Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm., supra, this is an "action before a tribunal customarily utilizing a jury as its factfinding arm." 430 U.S. at 461 ~~16~~ 16. As put in Pernell v. Southall Realty, supra, it is one of the "ordinary civil actions in the . . . court of general jurisdiction." 416 U.S. at 383. The "Seventh Amendment prevents Congress from depriving a litigant of a jury trial" in such a tribunal. Atlas Roofing Co., Inc., supra, 430 U.S. at 461, n. 16.

Under the principles of the foregoing decisions it is immaterial that the defendant in this case is the sovereign.^{21/} The Seventh Amendment applies because the "nature

^{21/} Also relevant is Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961), where this court held that the Amendment applied to a suit by the United States to collect taxes from a citizen. The court concluded that the suit was analogous to the common law action of debt and stated:

"the right to jury trial exists in actions by the United States where it would in a similar action between private parties. [Citations omitted.]" 289 F.2d at 51.

There is no reason why the same is not true of this suit against the United States. It follows that a jury trial is required here under the principles applied in Damsky, as well as under the somewhat different tests articulated later by the Supreme Court.

of the issue to be tried" is legal, Ross v. Bernhard, supra, 396 U.S. at 538, and because this is an ordinary civil action in a court of law which customarily utilizes trial juries. This would be so even if suits against the sovereign were a type of suit which was completely unknown at common law. Id., Pernell v. Southall Realty, supra, 416 U.S. at 376.^{22/}

Indeed, the policies underlying the development and preservation of juries make it even more important to preserve jury trials in suits involving the sovereign than in suits among private parties. As the trial jury matured during the seventeenth and eighteenth centuries, one of its principal values lay in its ability to function as an independent body of citizens, free of control by the King or the King's judges. See generally Plucknett, A Concise History of the Common Law, pp. 136-8 (1956 ed.); see also Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670). Likewise, in the present day and time the appearance of justice is best served if disputes between citizens and the government are tried by independent bodies of citizens, rather

^{22/} Nevertheless, we demonstrate in the next section that suits against the Crown were tried by juries in law courts long before 1791.

than by judges who -- no matter how impartial in fact -- are officers of the governmental litigant.

The Supreme Court has never decided whether the Seventh Amendment applies to tort suits brought in district courts against the government,^{23/} and we know of no decision of any court of appeals on the point.^{24/} However, the

^{23/} In the district court the government relied on United States v. Neustadt, 366 U.S. 696, 701 n. 10 (1961), where the Court said: "There is no right to a jury trial under the Tort Claims Act. 28 U.S.C. § 2402." This is nothing more than an off-hand observation that the Act, § 2402, denies a jury trial. It says nothing about the issue before this court, namely whether the Seventh Amendment guarantees a right to jury trial, thereby invalidating § 2402 as to this case.

^{24/} We know of only one case in which the point has been decided, namely Glasspool v. United States, 190 F.Supp. 804 (D.Del. 1961). The court held that the Seventh Amendment does not apply to suits against the government in the district courts because they are not "suits at common law." 190 F.Supp. at 807. The basis for the decision was the following:

"the Amendment relating to trial by jury is applicable only to the rights and remedies generally known and enforced at common law by jury trial. . . . At common law there is no right of action against a sovereign enforceable by a jury trial or otherwise. [footnote omitted.]" Id.

This decision is erroneous and is not consistent with the law. First, the case was decided long before the Supreme Court's decisions in Ross v. Bernhard, Curtis v. Loether, and Pernell v. Southall Realty, *supra*, and is inconsistent with the "nature of the issue" test of those decisions. Second, the decision is wrong even if one accepts the test applied by the court because, as shown below, suits against the Crown were allowed at common law and were tried by jury. The Glasspool court offered no citation for its contrary assertion.

1
Court has considered the applicability of the Amendment to contract actions in the Court of Claims.

In McElrath v. United States, 102 U.S. 426 (1880), a former military officer sued in the Court of Claims to recover pay and allowances. The government counterclaimed for moneys allegedly paid to the claimant without authority, and the Court of Claims entered judgment upon the counterclaim. On appeal the claimant argued that it was contrary to the Seventh Amendment for the Court of Claims, sitting as it does without a jury, to enter judgment on the counterclaim. The Court rejected the argument, saying:

"Suits against the Government in the Court of Claims, whether reference be had to the claimant's demand, or to the defense, or to any set-off, or counter-claim which the Government may assert, are not controlled by the Seventh Amendment. They are not suits at common law within its true meaning. The Government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. Congress, by the Act in question, informs the claimant that if he avails himself of the privilege of suing the Government in the special court organized for that purpose, he may be met with a set-off, counter claim, or other demand of the Government, upon which judgment may go against him, without the intervention of a jury, if the court, upon the whole case, is of opinion that the Government is entitled to such judgment. If the claimant avails himself of the privilege thus

granted, he must do so subject to the conditions annexed by the Government to the exercise of the privilege." 102 U.S. at 440.

In United States v. Sherwood, 312 U.S. 584, 587

(1941) (dictum), the Court developed this point as follows:

"The Court of Claims is a legislative, not a constitutional court. Its judicial power is derived not from the Judiciary Article of the Constitution, article 3, but from the Congressional power 'to pay the debts * * * of the United States', article 1, § 8, cl. 1, which it is free to exercise through judicial as well as non-judicial agencies. . . . It is for this reason, and because of the power of the sovereign to attach conditions to its consent to be sued, that Congress, despite the Seventh Amendment, may dispense with a jury trial in suits brought in the Court of Claims. McElrath v. United States, [supra], [additional citations omitted]."

Thus, the Court upheld the power of Congress to forbid jury trials of cases in the Court of Claims, but only because the proceedings in a "legislative court," or an administrative agency, are not "suits at common law." Cf., Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm., supra.

It was not until Glidden v. Zdanok, 370 U.S. 530 (1962), that the Court abandoned the view that the Court of Claims was a legislative court and held that its judges are Article III judges, competent to sit by designation in dis-

strict courts and courts of appeals. Since the decision in Glidden the Court has had no occasion to reconsider the applicability of the Seventh Amendment in the Court of Claims. 24/

24/ In Glidden a three-justice plurality said the following concerning the issue before this court:

"A preliminary consideration that need not detain us long is the absence of provision for jury trial of counterclaims by the Government in actions before the Court of Claims. Despite dictum to the contrary in United States v. Sherwood, 312 U.S. 584, 587, the legitimacy of that nonjury mode of trial does not depend upon the supposed 'legislative' character of the court. It derives instead, as indeed was also noted in Sherwood, ibid., from the fact that suits against the Government, requiring as they do a legislative waiver of immunity, are not 'suits at common law' within the meaning of the Seventh Amendment. McElrath v. United States, [supra]. The Congress was not, therefore, required to provide jury trials for plaintiffs suing in the Court of Claims; the reasonableness of its later decision to obviate the need for multiple litigation precludes a finding that its imposition of amenability to nonjury set-offs was an unconstitutional condition. Cf., Minneapolis & St. L. R. Co. v. Bombolis, 241 U.S. 211; see 74 Harv.L.Rev. 414, 415 (1960)." 370 U.S. at 572.

This statement constitutes no authority against plaintiff's position that this suit in a district court is a "suit at common law." First, it is merely a dictum by a small minority of the Court. Second, Glidden was decided years before the Court's expansive Seventh Amendment decisions in Ross v. Bernhard, Curtis v. Loether, and Pernell v. Southall Realty, supra. Third, the plurality's only authority -- McElrath v. United States, supra -- does not support the proposition for which it is cited. As noted above, McElrath held only that suits "in the Court of Claims" are not suits at common law within the Amendment. 102 U.S. at 440. We agree that McElrath was correctly decided and, as discussed below, that it is still good law. For the same reasons there is no authority in the Court's earlier dictum -- similar to that of the Glidden plurality -- in Galloway v. United States, 319 U.S. 372, 388 (1943).

It is worth emphasizing, however, in concluding this section, that there is nothing in the Court's Seventh Amendment decisions, in Glidden, or in the arguments made by plaintiff here, that requires a jury trial of cases brought against the United States in the Court of Claims. By custom, rule and statute, the Article III judges of the Court of Claims sit in an appellate capacity.^{25/} They constitute "the court" (Rule 8), and sit in panels of three (Rule 7(a)) to review decisions of "trial judges," (Rule 12(d)(2)).^{26/} The trial judges are United States Commis-

sioners, not Article III judges.^{27/} In other words, trials

^{25/} Rule 8 of the Rules of the Court of Claims provides:

"In order to effectuate the purposes of Rule 13 and related rules, the judges of the court, appointed by the President under Article III of the Constitution, shall function primarily in an appellate capacity: Provided, That there shall be no change in the title of any judge, nor shall this rule be construed to limit or affect his exercise of any judicial act, power, or duty that is provided by law or by these rules. Such judges are 'the court' except to the extent certain powers are specifically delegated to the trial judges." 28 U.S.C.A.

See also 28 U.S.C. § 2503.

^{26/} See also Rule 12(b) which provides that "Cases commenced in the Court of Claims will be referred to trial judges for the conduct of proceedings pursuant to the provisions of Rule 13(b)." Rule 13(b) provides that the trial judge will be responsible for the trial of issues of fact and for making findings of fact, among other things.

^{27/} 28 U.S.C. § 792; General Order No. 2 of 1973 of the United States Court of Claims, reprinted in 28 U.S.C.A. before Rule 1 of the Court of Claims Rules.

are held before administrative officers -- comparable to special masters, United States Magistrates, or the hearing officers utilized by numerous administrative agencies -- subject to appellate review by the court.

These proceedings are a far cry from the "ordinary civil actions in the . . . court of general jurisdiction" to which the Seventh Amendment applies. Pernell v. Southall Realty, supra, 416 U.S. at 384. A proceeding before a nonjudicial officer has never entailed a right to trial by jury. See Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm., supra; Pernell v. Southall Realty, supra, 416 U.S. at 384; and United States v. Sherwood, supra. Neither are juries utilized or required in appellate proceedings, such as are conducted before the judges of the Court of Claims. Alternatively, if the function of that court's judges be regarded as judicial review of administrative determinations by the trial judges, juries have never had a place in such proceedings.

In sum, even though under Glidden the Court of Claims is now an Article III court, the business of the court continues to be conducted according to forms and procedures which bear no resemblance to ordinary civil actions such as the one at bar. Proceedings in the Court of Claims

are therefore not "suits at common law" and are not governed by the Seventh Amendment.

2. Even If the Seventh Amendment Would Apply Only If an Analog to the Present Action Existed in 1791, a Jury Trial Would Be Required, Because by 1791 Common Law Actions Against the Sovereign Were Well Established, and They Were Tried by Jury.

The existence of suits against the Crown was noted by the Supreme Court shortly after adoption of the Seventh Amendment:

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." Marbury v. Madison, 1 Cranch 137, 163 (1803).

The Chief Justice doubtless had in mind the most prominent form of proceeding against the Crown, the "Petition of Right." This form developed over the 14th and 15th centuries and by the 16th century it was generally used to secure legal rights against the sovereign. See generally, the thorough study in L. Ehrlich, Proceedings Against the Crown (1216-1377), reprinted in VI Oxford Studies in Social and Legal History (Vinogradoff Ed. 1921). The function of

the petition was "to gain redress for wrongs which, if the case had been between subject and subject, would have been redressed by one of the real actions." 9 Holdsworth, A History of English Law, p. 18 (1926). The petition was initially employed for the protection of rights in property and later contract. 9 Holdsworth, *supra*, pp. 17-21, 28/ 41.

The procedure was as follows: a petition was addressed to the King. The King ordinarily endorsed the petition, "soit droit fait als parties" -- let right be 29/ done; this was in effect a waiver of the sovereign's

28/ The petition was also employed to seek redress for what today would be regarded as tortious conduct, but these proceedings were frequently dismissed for legal insufficiency because of the principle that, in contemplation of law, the King could do no wrong. See, *e.g.*, Tobin v. R., 143 Eng. Rep. 1148, 1164-70 (C.P. 1864).

However, many tort-type claims against the Crown were litigated under the broader scope originally given to actions concerning real property and contract. 9 Holdsworth, *supra*, pp. 17-21. Robertson, Civil Proceedings By and Against the Crown, 341-42 (1908). The concept of sovereign infallibility -- as opposed to sovereign immunity from suit -- was never accepted in the United States, and its existence in England does not detract from plaintiff's argument here. Today's Seventh Amendment issue does not turn on whether mail opening by the Crown in the 18th century would have been a legally cognizable wrong resulting in trial by jury. Cf. Ross v. Bernhard, Curtis v. Loether, *supra*.

29/ Clode, Petition of Right, 25 (1887).

immunity from suit corresponding to the blanket waiver found in the Tort Claims Act. A special commission issued from chancery to investigate the claim.^{30/} The commission made its return to chancery, and if it reported that the petition was well-founded, the King was required to plead. 9 Holdsworth, supra, pp. 16-17. If a triable issue then emerged, a jury was empanelled to render a verdict, either in chancery or, later, in Kings Bench. Ehrlich, supra, p.173; Staunford, Exposition of the Kinges Prerogative, folio 77b (1577).^{31/}

^{30/} Proceedings upon petitions of right were conducted pursuant to the common law jurisdiction or "side" of chancery which was by no means exclusively a court of equity. See generally Plucknett, A Concise History of the Common Law, pp. 163-5; esp. 164-5 (1956 ed.). See also Ehrlich, supra at 174:

"all affairs touching the common law should be presented to the chancellor. That meant, even in cases in which a claim against the king (e.g. for dower), was based on the common law."

In short, proceedings on Petitions of Right were legal, not equitable in nature. Clode, supra, 142. Petitions of right did not comprehend equitable claims until the early 19th century. Id. at 143.

^{31/} Staunford says "[T]his judgment [against the King] sometime is geeven in the kinges bench and not in the Chauncery, and that is in case where the parties descende to an issue, thenfor the triall thereof they of the Chanucery must award Venire facias retournable in the kinges Bench at a certaine day. . . . And when the issue is founde for the partie, they of the kinges bench shall geeve judgment and award an Ouster le maine without suing for the same in Chanerie. . . ." The writ venire facias was for the empanelling of a jury. Duncombe's Trials Per Pais (9th ed. 1793) at 46-47; 3 Bl.Comm. 352.

The earliest case in point which we have found, which is reported both thoroughly and in English, is Baron de Bode's Case, 115 Eng. Rep. 854 (Q.B. 1845), aff'd 116 Eng. Rep. 1302 (Ex.Ch. 1848), aff'd 10 Eng. Rep. 176 (H.L. 1851). There, issue was joined, a jury was empanelled in Queen's Bench, 115 Eng. Rep. at 867, and after trial a verdict was rendered in part against the Crown. Id. at 876.

Although Baron de Bode's Case occurred a half-century after the adoption of the Seventh Amendment, the procedure followed in that case is identical to that which, according to all the learned scholars, was invariably used since ancient times. See, e.g., Ehrlich, supra, p. 173:

"The legal aspect of each case which came up in the chancery would be discussed there. That might furnish a sufficient basis for judgement. If it did not, and issue was joined, the jury could at first be summoned into the chancery. That practice continued certainly until 5 Edward III (1331). But even before it was discontinued, cases were already sent to the king's bench after issue had been joined in the chancery, and, beginning at the latest in 1336, this latter practice became the unbroken rule. [citations omitted.]"

See also Staunford, supra, pp. 46-7, and 9 Holdsworth, supra, p. 17. For cases involving trial by jury against the Crown,

see e.g., Y.B. 38 Ed. III, 14 (1364); Placita in Cancellaria (Tower Series), file 2, membrane 14-5 (1355), reprinted with partial translation at Ehrlich, supra, pp. 242-3.^{32/}

We know of no petition of right case involving triable issues where the Crown even attempted to block a trial by jury. No such case is cited by any scholar. In short, British subjects had a right to jury trials in these cases both prior to and after 1791, for the concept of "right" then had no meaning except by reference to what the Crown and its courts traditionally allowed.

^{32/} There are few reported petition of right cases from the 18th century as the petition was less used then owing to the procedural superiority of other forms of action, known as traverse of office and monstrance de droit. 9 Holdsworth, supra, 25-6. These actions were also tried by jury. See, e.g., Rex v. Roberts, 93 Eng. Rep. 1131 (K. B. 1744) (traverse of office). In any event the petition of right remained available throughout this period. 9 Holdsworth, supra, 22; Penn v. Lord Baltimore, 27 Eng. Rep. 1132, 1133 (Ch. 1750) (argument of Attorney General). The petition resurged in the early 19th century. 9 Holdsworth, supra, p. 33; Clode, supra, 65; Baron de Bode's Case, supra. The proceeding was codified by the Petitions of Rights Act of 1860 (23 and 24 Vict. c. 34). The statute made no change in the right of jury trial, according the parties all procedural rights they ordinarily possessed in a civil action. Petitions of Rights Act, supra, Art. VII. Robertson, supra, at 392.

3. The Statutory Ban on Trial by Jury
Is Not Valid as a Condition Upon
the Waiver of Sovereign Immunity

The doctrine of sovereign immunity is a creature of history and the courts, and it has no constitutional basis. See generally Hart & Wechsler, The Federal Courts and the Federal System, pp. 1339-51 (Bator Ed. 1973). Under the doctrine the government need not submit to common law suits in the district courts. But when the government consents to such suits -- as it did by way of the Tort Claims Act -- it may not impose conditions which run afoul of specific constitutional commands. Surely no one would argue that Congress could lawfully proclaim that tort suits against the United States could be brought by citizens but only if they are caucasian, or only if they have not criticized government policies. There is nothing in sovereign immunity which confers on Congress the power to impose such conditions, nor has it power to impose the condition involved in this case.

It is now settled that an unconstitutional condition may not be imposed in connection with government action even when citizens have no right to compel the action in the first place. See, e.g., Sherbert v. Verner, 374 U.S. 398, 404 (1963) (invalidating condition on unemployment

benefits); Shapiro v. Thompson, 394 U.S. 618, 627 n. 6 (1969) (welfare benefits); Bell v. Burson, 402 U.S. 535, 539 (1971) (retention of driver's license); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (parole).^{33/} See generally Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv.L.Rev. 1439 (1968).

Although the government may have no duty to grant any of the benefits involved in the above cases, once it does it must do so in accordance with the requirements of the Constitution. In this respect there is no difference between the government's consent to suit and any other benefit which it chooses to grant to citizens.

None of the cases in which the Supreme Court has upheld a condition on the waiver of sovereign immunity involved a condition which ran afoul of the Constitution. See, e.g., Minnesota v. United States, 305 U.S. 382 (1939) (condition that suits against the United States be brought

^{33/} See also Lamont v. Postmaster General, 381 U.S. 301, 305 (1965), where the Court adopted the position of Mr. Justice Holmes, dissenting in Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 437:

"The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues. . . ."

in federal court); McElrath v. United States, supra (condition that claims against the United States be tried in a special legislative court). Nor is there any other authority to support such a condition.

Moreover, in reality the jury trial ban in 28 U.S.C. § 2402 is not a "condition" imposed upon citizens' right or ability to sue the government. Nor is it a condition or limitation upon the subject matter jurisdiction of district courts. It is, on its face, a limitation on the mode of trial in cases over which jurisdiction is conferred on district courts by § 1346(b). It is a limitation which the Seventh Amendment forbids.

It may be that Congress is under no obligation to give district courts jurisdiction of suits against the government, of suits between citizens of different states, or of federal question suits. Indeed, Congress may have no obligation to confer any jurisdiction whatsoever or even to create Article III trial courts. See, e.g., Lockerty v. Phillips, 319 U.S. 182, 187 (1943). But see Martin v. Hunter's Lessee, 1 Wheat. 304, 306 (1816). But once such a court is created and vested with jurisdiction of ordinary civil actions involving legal issues, Congress has no power to bar jury trial of such issues. Atlas Roofing Co., Inc.

v. Occupational Safety and Health Review Comm., supra, 430 U.S. at 461 n. 16. Few would argue that Congress could amend 28 U.S.C. §§ 1331 and 1332 so as to ban jury trials in federal question and diversity cases. It has no more power to ban a jury trial in the present case.

Judge Weinstein did not question that the law of the Seventh Amendment, as expounded by the Supreme Court, requires a jury trial of this case. He declined to order a jury trial, however, because he thought appellate authorities -- particularly the Supreme Court and the Chief Justice -- would disagree owing to practical considerations relating to work level and trial delays. These concerns -- serious as they are -- do not justify a departure from the command of the Seventh Amendment. The same considerations were urged upon the Court and specifically rejected without dissent in Curtis v. Loether, supra, 415 U.S. at 198 and Pernell v. Southall Realty, supra, 416 U.S. at 383-4.

Trial to the court with an advisory jury is no substitute for the trial by jury and binding verdict referred to in the Seventh Amendment. For a summary of the limited role and effect of an advisory jury see (American) Lumbermens Mutual Casualty Co. v. Timms & Howard, 108 F.2d 497, 500 (2d Cir. 1939). Trial with an advisory jury is nothing more than

a bench trial in which the jury provides advice which may be accepted or rejected by the trial and appellate courts. Id. The jury's advice was in fact rejected by the district judge in the case at bar. Of the twelve jurors only one advised an award as low as \$2,500.00. Three advised \$10,000.00 and eight advised \$5,000.00. The court awarded \$1,000.00.

CONCLUSION

The court should affirm the judgment as to liability of the United States and remand for a trial by jury of the issue of damages.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 77-6175

NORMAN BIRNBAUM, et al.,

Plaintiffs

against

UNITED STATES OF AMERICA,

Defendant

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 306 W 90,
NY, NY.

That on February 14, 1978 ~~to~~ deponent served the annexed *orig*

on Leonard Schaitman, Esq.,
attorney(s) for Defendant-appellant
in this action at Department of Justice, Civil Division, Washington, D.C. 20530
the address designated by said attorney(s) for that purpose by depositing ~~2~~ true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me

Antonina Manuela

ANTONIA MANUELA
Notary Public, State of New York
No. 03-4602065
Qualified in Bronx County
Commission Expires March 30, 1978

Herbert Jordan

The name signed must be printed beneath
Herbert Jordan